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No. OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 1997

PEARL B. MATTHEWS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When an attorney has been designated by Farmers Home Administration (FmHA) as a closing agent for a farm loan from FmHA, pursuant to 7 C.F.R. 1807.1, 1807.2, and 1890t.2 (1978), do the attorney's responsibilities to FmHA permit a court to assume as a matter of law that the attorney represents the interests of a co-obligor of the applicant for the loan, or may the co-obligor show that the attorney was acting as an agent of FmHA in connection with the closing?

2. Where a defendant to a foreclosure action pleads as an affirmative defense that her signature to the loan documents was secured by undue influence, may a federal court applying North Carolina law grant judgment on the pleadings against the defendant, for failure to allege that the person allegedly exerting undue influence misused his position of trust in order to gain personally from the transaction which resulted from his undue influence?

3. Does Farmers Home Administration assume a duty, whether fiduciary, quasi-fiduciary, or other in nature, to act in a person's best interest, and can it be found liable for violation of that duty, if it instructs that person to sign loan documents, when the person has no knowledge of the consequences?

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE UNDER SUP.CT.R. 29.6

Pearl B. Matthews, Petitioner herein, was defendant in the trial court and appellant in the Court of Appeals. The United States of America, Respondent herein, was plaintiff in the trial court and appellee in the Court of Appeals. No party to this proceeding is a corporation, and no corporation was a party to the proceedings below.

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I. In holding that the attorney who handled the closing of an FmHA loan was acting as agent for the borrower and not as agent for FmHA, the courts below have decided an important federal question in a way which conflicts with at least one state court of last resort.

A. The courts below disregarded FmHA regulations and All American Realty, Inc. v. Sweet, 107 Idaho 229, 687 P.2d 1356 (Idaho 1984), in characterizing the attorney who handled the loan closing as Ms. Matthews' attorney.

B. The courts below ruled directly contrary to controlling North Carolina law in granting judgment on the pleadings on Petitioner's undue influence claim for failure to allege that Mr. Woodall or FmHA gained any advantage from the exercise of undue influence.

II. In treating the relationship between the Matthews and FmHA as simply a debtor-creditor relationship, without fiduciary duty on FmHA's part, and disregarding both the relationship between FmHA and its borrowers and FmHA's conduct toward the Matthews, the courts below decided an important federal question in a manner which conflicts with at least one state court of last resort.

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FEDERAL CASES

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54 FR 12211 (3/24/89), *et seq.*

56 FR 67470 (12/31/91), *et seq.*

STATE STATUTES, REGULATIONS, etc.

North Carolina Pattern Jury Instructions-Civil 505.30 (May 1982)

OTHER AUTHORITIES

The Restatement(2d), Torts, Section 323

CITATIONS OF REPORTS OF OPINIONS AND ORDERS ENTERED BY COURTS BELOW

The opinion and order of the District Court are unpublished. The decision of the Court of Appeals was also unpublished, but it is reported at 1997 U.S.App. LEXIS 32248.

BASIS FOR JURISDICTION IN THIS COURT

The judgment sought to be reviewed was entered on November 18, 1997. Petitioner did not petition for rehearing. This Court has jurisdiction to review the judgment of the Court of Appeals on a writ of certiorari pursuant to 28 U.S.C. 1254.1.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PEARL B. MATTHEWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This Petition arises from a farm foreclosure action involving a loan obtained by Petitioner's late husband from the Farmers Home Administration (hereinafter "FmHA").

On February 23, 1995, Respondent United States of America filed this action in the district court seeking a money judgment against Petitioner and a judgment of foreclosure of the deed of trust which Respondent holds against all of Petitioner's real property. The District Court had original jurisdiction over the subject matter of the action pursuant to 28 U.S.C. Section 1345, as an

action commenced by the United States.

Petitioner filed a verified Answer in a timely manner, seeking to rescind the note and deed of trust because of the lack of mental capacity of her late husband when he signed the note and deed of trust. (A-47 *et seq.*) Ms. Matthews also pleaded affirmative defenses of violation of FmHA regulations in failing to determine Mr. Matthews' competency, and undue influence which was exerted on Petitioner by agents of Respondent to obtain her signatures on those documents. Plaintiff also sought recission of the note and deed of trust, and recoupment of the amounts paid thereunder, because of FmHA's breach of fiduciary duty in executing the note and deed of trust without ascertaining the effect of refinancing Mr. Matthews' debts given his grave illness.

Prior to any discovery, the government moved for judgment on the pleadings under Fed.R.Civ.P. 12(c). Said motion was granted by the District Court by Order entered July 28, 1995. (A-1) The final judgment of the District Court was entered on August 9, 1995. (A-10) Petitioner took her appeal from said judgment and filed her motion for stay with the District court. Said motion was denied and Petitioner filed a motion for a stay with the Court of Appeals. The Court of Appeals denied the motion for a stay and entered judgment affirming the judgment of the District Court. The judgment of the Court of Appeals was entered on November 18, 1997. (A-5)

Factual background

Petitioner and her late husband, William Preston Matthews, owned and lived on a small farm in Lillington, North Carolina. Mr. Matthews applied for an Economic Emergency loan from FmHA on September 17, 1978. He applied for said loan to refinance various obligations which had been incurred in the operation of his and Petitioner's farm. At the time of the application for said loan, Mr. Matthews was under a doctor's care for chronic renal failure and was in extremely poor health. However, Mr. Matthews' loan application was approved by FmHA on November 30, 1978. (A-47, *et seq.*)

On December 1, 1978 Mr. Matthews had a major motor seizure at this home immediately after dialysis and was rushed to Duke Hospital in Durham, North Carolina. Upon Mr. Matthews' admission to the hospital, the attending physician noted that Mr. Matthews displayed symptoms of dialysis dementia, a progressive illness, suffered by long-term dialysis patients, the symptoms of which include disorders of memory, lapses in concentration, alteration of personality and psychosis. Id.

On December 21, 1978, while Mr. Matthews was still in the hospital, an FmHA employee from the Harnett County office and attorney Marshall Woodall drove from Harnett County, North Carolina, to Duke Hospital, to have Mr. Matthews execute the papers necessary to close the loan from FmHA. Marshall

Woodall was the "designated attorney" for the loan closing. Id. (The role of a "designated attorney" is discussed below.)

Mr. Matthews had undergone surgery on the day that the FmHA county supervisor and Mr. Woodall arrived. However, he met with the FmHA county supervisor and attorney Woodall in his hospital room after said surgical procedure. While in his hospital bed, Mr. Matthews signed the promissory note for $88,000.00, as well as a deed of trust to all of the real property owned by Mr. Matthews and Petitioner, as security for the loan. Id.

At the time Mr. Matthews signed the note and deed of trust, Petitioner was at her home and was not aware of the signing of the documents for the loan or even of the fact that Mr. Matthews had applied for a loan. She was under a great deal of stress because of the dire illness of her husband. Id.

On December 22, 1978 attorney Woodall brought the note and deed of trust to Petitioner and instructed her to sign them. Woodall made no attempt to explain the aforementioned note and deed of trust to Petitioner. He told her only that her husband had signed them and that her signature was also required. Attorney Woodall was known to Ms. Matthews because he had performed legal services for Petitioner and Mr. Matthews in the past. Petitioner, being uninformed as to her husband's business affairs and her husband's mental status

at the time of his signing of the documents, and trusting Mr. Woodall because of his past work for the Matthews, signed the note and deed of trust on Mr. Woodall's instructions. Id.

Mr. Matthews died of chronic renal failure less than four months later, on April 17, 1979. Thereafter, Petitioner made payments on the FmHA loan for over a decade before she defaulted. The government accelerated the loan on October 30, 1991. Id.

Petitioner alleged on information and beflief that none of the obligations which Mr. Matthews sought to refinance were in default at the time Mr. Matthews applied for the Economic Emergency Loan. She also alleged that many or all of the loans which were refinanced by the loan from FmHA were insured loans which would have been paid by credit life insurance upon the death of her husband, and that had the Matthews not refinanced the insured debt, the debt would have been declared satisfied in full upon Mr. Matthews' death. Id.

One of the insured obligations was a note in the amount of $11,900.00 to the Federal Land Bank with a securing deed of trust. For some time before Mr. Matthews' death, the regular annual payments on that loan had been made from a credit disability policy issued for said loan. Said credit disability policy was cancelled at the time the Federal Land Bank loan was refinanced. Id.

The note and deed of trust to FmHA left defendant with a significantly

greater debt load than she would have had, had the original debts not been refinanced. Id.

The Opinion of the District Court

The district court said that the issue of Mr. Matthews' competence was irrelevant because Petitioner had become the owner of the property encumbered by the loan, and in any case, she had signed the promissory note and deed of trust herself in 1978. "At his death, the debt, the land, and the value of the loan became the defendant's responsibility solely." (A-2,3) When she defaulted, the government was entitled to accelerate the loan and foreclose on the property.

The court found no merit in Ms. Matthews' affirmative defenses of undue influence and breach of fiduciary duty by FmHA. The court stated that FmHA was not in a fiduciary relationship with Ms. Matthews, and breached no duty to her. The court also asserted that the facts did not indicate that Ms. Matthews was unduly influenced into signing the promissory note and deed of trust.

> The facts, viewed in the light most favorable to the defendant, indicate that she was in her home with her attorney at the time she executed the documents. While the Court recognizes that she was under emotional and financial stress due to her husband's medical condition, she has not shown that her attorney unduly influenced her decision, or took advantage of her emotional

state of mind. (A-3)

The court also said that to establish undue influence, Ms. Matthews would have to show that the FmHA or her attorney misused their position of trust in order to gain personally from the transaction she was influenced into making, and that Ms. Matthews had not presented a forecast of such evidence in this case. Id.

The Opinion of the Court of Appeals

The Fourth Circuit decided the appeal on briefs and affirmed in a per curiam opinion, "finding that Matthews can prove no facts sufficient to support her affirmative defenses." (A-6)

The court first addressed Ms. Matthews claim that attorney Woodall acted as an agent for FmHA in having Mr. Matthews execute the loan papers in the hospital and instructing her to sign the note and deed of trust without explaining them to her. The Court of Appeals said that the district court properly found that Mr. Woodall was not acting as an agent for FmHA because "Matthews' own pleadings belie her claim--she stated that Woodall acted as her agent in the loan transaction." In fact, Plaintiff's Answer plainly states: "Upon information and belief, at all times relevant to this action, Woodall was acting as agent for FmHA."

The court further found Petitioner's forecast of the evidence of undue

influence by Mr. Woodall over her insufficient "because she does not allege that Woodall abused his position of trust to gain from the transaction." (A-8)

With regard to Ms. Matthews' claim that FHA breached a fiduciary duty owed to her, the court said, without discussion, that Ms. Matthews' allegations that FHA is a lender of last resort and that it customarily enters a fiduciary relationship with its borrowers were insufficient to establish the existence of a fiduciary relationship, and without a fiduciary relationship, there could not be a breach of duty.

ARGUMENT

I.

IN HOLDING THAT THE ATTORNEY WHO HANDLED THE CLOSING OF AN FMHA LOAN WAS ACTING AS AGENT FOR THE BORROWER AND NOT AS AGENT FOR FMHA, THE COURTS BELOW HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH AT LEAST ONE STATE COURT OF LAST RESORT.

A. The courts below disregarded FmHA regulations and All American Realty, Inc. v. Sweet, 107 Idaho 229, 687 P.2d 1356 (Idaho 1984), in characterizing the attorney who handled the loan closing as Ms. Matthews' attorney.

The courts below rejected Ms. Matthews' defense of undue influence in large part because they considered Mr. Woodall, the attorney who handled the loan closing, to be Ms. Matthews' attorney. They did not consider the significance of the regulations of the Department of Agriculture concerning the role of a "designated attorney" in FmHA loan closings. While it is true that the usual practice of FmHA at the time was to have the borrower select the closing attorney from its list of approved local attorneys, it does not necessarily follow that Woodall was representing Mr. or Mrs. Matthews when he instructed Ms. Matthews to sign the note and deed of trust in question. As shown below, an attorney participating in an FmHA loan closing participates first and foremost as "closing agent" for the benefit of FmHA. As noted below, the Supreme Court of Idaho has held that the "designated attorney" in an FmHA loan closing may be more accountable to FmHA than to the original clients, whose loan he is trying to close.

The question of where the duty of an FmHA "designated attorney" lies is an important Federal question. Although the agency of the U.S. government known as the Farmers Home Administration no longer exists under that name, its successor agency, the Farm Service Agency (FSA) continues to make direct loans to thousands of farmers each year. These farmers are by and large beginning farmers and are all persons who cannot

obtain credit anywhere else. FSA is governed by the same regulations as governed FmHA. With some minor changes, as are discussed below, attorneys who close loans for FSA continue to represent the agency and not the borrower. This fact is not known to most borrowers and can often be to the borrowers' detriment when obtaining a loan from FSA.

Furthermore, if there is evidence tending to show that a principal-agent relationship exists, then the question of whether such a relationship exists is one of fact to be determined by a jury. Bradson Mercantile, Inc. v. Industrial Contracting Corporation, 883 F.Supp. 37 (1995). Given the allegations of Ms. Matthews' Answer and the FmHA regulations, the issue of whether there was a principal-agent relationship between Ms. Matthews and Mr. Woodall should not have been resolved against Ms. Matthews through judgment on the pleadings.

Under FmHA regulations in effect at the time of the Matthews loan in 1978, the attorneys involved in loan closings for FmHA loans were responsible to and to some extent financially dependent upon FmHA.

"Designated attorney" was an FmHA term defined in regulations applicable at all times relevant to this case, as an attorney who had qualified to serve as closing agent or "Escrow Agent" for FmHA loans, and who therefore had certain duties toward FmHA. Under FmHA regulations, the role of closing agent

could be performed by either a designated attorney or a designated title company. Under these regulations, although the borrower officially "hired" the attorney or title company, he had to hire one who had previously been "designated" by FmHA. See 7 C.F.R. 1890t.2 (A-39), 7 C.F.R. 1807.1 (A-13), and 7 C.F.R. 1807.2 (A-19). The designated closing agent was then responsible for advising the FmHA County Supervisor and ensuring that FmHA "obtain[ed] a valid mortgage lien on the property of the priority required by the Farmers Home Administration." 7 C.F.R. 1807.2(f)(A-30)

The regulations were re-numbered and amended in certain respects in 1991. See 56 FR 67470 (12/31/91). Insofar as the new regulations are relevant to this proceeding, they are codified at 7 C.F.R. Part 1927, Subpart B - Real Estate Title Clearance and Loan Closing. The major change of relevance to this Petition is that instead of FmHA or its successor agency maintaining a list of "designated attorneys," any attorney can become an "approved" attorney for a particular case by certifying to the Agency that he or she meets the requirements (basically, "good standing," sufficient liability insurance, and fidelity bonding). The new regulations did not change the role of the attorney as "closing agent" or "settlement agent," "commissioned" [see 54 FR 12212] by FmHA to do title work, etc. One purpose of the change was to increase the number of attorneys handling loan closings, and thereby cause attorney

fees to fall. 56 FR 67470.

In All American Realty, Inc. v. Sweet, 107 Idaho 229, 687 P.2d 1356 (Idaho 1984), the Supreme Court of Idaho considered "the duty of an attorney, acting as closing agent pursuant to Farm [sic] Home Administration regulations in a real estate transaction, to the real estate broker, for failure of the attorney to pay the broker its commission as required by the escrow instructions." The court said, "As the designated closing agent under FmHA regulations, Sweet was acting in the capacity of an escrow holder." Although the main opinion is not clear, a concurring opinion states that the attorney was retained by the buyer and seller before being appointed "designated attorney" by FmHA. At the closing, the buyer and seller told the "designated attorney" that no broker's commission was due and instructed their attorney to pay the seller. The broker sued the attorney. The court reversed the grant of summary judgment for the attorney, in effect holding that the duties of the attorney as "designated attorney" could be contrary to the interests and instructions of his own clients.

A concurring justice, citing 7 C.F.R. Section 1807.1(e) and Section 1890t.2, stated: "FmHA assumes the right to dictate to people whose transactions involve its monies that they employe a designated FmHA closing agent." The justice pointed out that the designated attorney was acting as closing agent at

the direction of FmHA, not performing services for the borrower or seller, although in that case he had represented the buyer earlier.

For other cases noting, but not resolving, the uncertain status of an FmHA "designated attorney," see U.S. v. Bailey, 734 F.2d 296 (7th Cir. 1984); Provencal v. Michel Construction, Inc., 505 F.Supp. 770 (W.D.Mich. 1980).

Thus, where an attorney is serving as a designated attorney to protect the interests of FmHA, no assumption is justified that the attorney "represents" the interests of someone whose signature is required for the loan to close. Although it is true that a bare allegation of agency without any supporting facts is not sufficient to raise an inference of agency in order to avoid judgment on the pleadings, Ms. Matthews has pled numerous facts from which a reasonable person could infer that Woodall was acting as agent for FmHA, not for her.

Ms. Matthews has pled that Woodall traveled to Duke Hospital in Durham with the FmHA County Supervisor and had Mr. Matthews sign the note and deed of trust while he was in an obvious state of dementia. Ms. Matthews has pled that Woodall made no attempt to explain the documents to her when he directed her to sign them. Assuming Woodall was acting properly, from these facts a reasonable person can infer that Woodall was acting on behalf of the lender and not the borrower in this instance. If Ms.

Matthews is given the benefit of this inference as she should be, then she should be given the opportunity to gather additional facts regarding the relationship of Woodall to FmHA through discovery and to prove to a jury at trial that a principal-agent relationship existed.

B. The courts below ruled directly contrary to controlling North Carolina law in granting judgment on the pleadings on Petitioner's undue influence claim for failure to allege that Mr. Woodall or FmHA gained any advantage from the exercise of undue influence.

Ms. Matthews has pled facts sufficient to support an inference that the government exercised undue influence over her in her execution of the note and deed of trust.

The courts below stated that, in order to show undue influence, it must be proved that the party exercising such influence does so to gain his own advantage. North Carolina law, which governs the note and deed of trust at issue, does not impose such an across-the-board requirement. The Supreme Court of North Carolina has stated that "[t]o constitute such undue influence, it is not necessary that there should exist moral turpitude . . ." In re Will of Turnage, 208 N.C. 130, 132, 179 S.E. 332, 333 (N.C. 1935). The North

Carolina Pattern Jury Instructions for undue influence state: "Such undue influence does not necessarily involve moral turpitude or even a bad or improper motive." N.C.P.I.-Civil 505.30 (May 1982). Whereas the benefit to be gained by the party exercising undue influence may be evidence as to its existence, the absence of such gain in no way validates the assent of the party being influenced. In order to show undue influence,

> Something must operate under the mind of a person allegedly unduly influenced which had a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes but rather the expression of the wishes of another or others.

Hardee v. Hardee, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983).

In considering a motion for judgment on the pleadings, all facts and inferences which could be drawn from the pleadings must be read in the light most favorable to the non-moving party. Jablowski v. Pan American World Airways, 863 F.2d 289, 290 (3rd Cir. 1988). Ms. Matthews has pled that she was in a very weakened mental state because of the grave illness of her husband and that she signed the note and deed of trust in question because she was instructed to do so by Woodall, whom she trusted because of legal services he had provided to her

and Mr. Matthews in the past. The pleading of these facts is sufficient to raise the issue of undue influence. Further, a reasonable inference is that there was advantage to Mr. Woodall, in that he would only be paid if the loan closing was completed.

Therefore, it was error for the courts below grant the government judgment on the pleadings on Petitioner's claim that Mr. Woodall, the designated loan closing agent on the FmHA loan, obtained her signatures on the promissory note and deed of trust through undue influence, while acting as an agent for FmHA.

II.

IN TREATING THE RELATIONSHIP BETWEEN THE MATTHEWS AND FMHA AS SIMPLY A DEBTOR-CREDITOR RELATIONSHIP, WITHOUT FIDUCIARY DUTY ON FMHA'S PART, AND DISREGARDING BOTH THE RELATIONSHIP BETWEEN FMHA AND ITS BORROWERS AND FMHA'S CONDUCT TOWARD THE MATTHEWS, THE COURTS BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH AT LEAST ONE STATE COURT OF LAST RESORT.

Decisions of this Court and state courts provide a basis for FmHA having at least a quasi-fiduciary duty toward its borrowers in some circumstances. The

facts pleaded by Petitioner in her Answer establish a colorable claim that such circumstances exist in her case, and entitle her to an opportunity to try to develop her claim.

Even commercial lenders can have duties toward their borrowers in appropriate circumstances. In Deist v. Wachholz, 208 Mont. 207, 678 P.2d 188 (Mont. 1984), the Supreme Court of Montana held that a bank officer was bound to insure that a bank customer was not "insufficiently informed of some factor which could affect [her] judgment," where the bank acted as financial advisor and the customer relied upon their counsel. To similar effect, in Hutson v. Wenatchee Federal Savings and Loan Association, 22 Wash.App. 91, 588 P.2d 1192 (Wash.App. 1978), while recognizing that the lender is not a fiduciary in the common sense of the term, the court held that a savings and loan association may be a quasi-fiduciary in its relationship with its customers by their reliance upon its superior knowledge and expertise and may have a duty to disclose and define information.

Under North Carolina law, it is not necessary to show a legal relationship to establish a fiduciary relationship. A de facto fiduciary relationship can be shown where "there is confidence reposed on one side, and the resulting superiority of influence on the other." Frizzell Construction Company, Inc. v. First Citizens Bank & Trust Company, 759 F.Supp. 286, 290-291 (E.D.N.C. 1991).

This Court has already recognized that FmHA is different than a commercial lender. In United States v. Kimbell Foods, Inc., 440 U.S. 715, 735 n.34, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), this Court noted "the evident distinction between lending programs for needy farmers and businesses and statutes created to guarantee receipt of debts due the United States." Id., 440 U.S. at 735 n.34. The Court said:

> The overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection. The same cannot be said of the [Small Business Administration] and [Farmers Home Administration] lending programs. They are a form of social welfare legislation, primarily designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms.

Id., 440 U.S. at 734-735. FmHA functions as a lender of last resort for low equity and beginning farmers, and for farmers who experienced losses from natural disasters.

Furthermore, FmHA has significant power over its borrowers, not only because FmHA borrowers have nowhere else to turn, but also because of the special status accorded FmHA supervisors by the regulations and the loan agreements. FmHA supervisors typically have extensive knowledge of the borrower's situation and

routinely advise farmers on all manner of issues related to their farms.

> FmHA is a . . . statutory scheme where a relationship of privity, trust and reliance is created between the borrowers and the agency.

Park v. United States, 517 F.Supp. 970, 979 (D.Oregon 1981).

In this case, FmHA obviously knew that Mr. Matthews was gravely ill, unable to run his farm, and, if not mentally incompetent, certainly of dubious competence. It went ahead and had Mr. Matthews sign papers which were manifestly not in his best interest. Although FmHA knew that Petitioner had not signed the loan application and had not been part of any discussion with FmHA personnel concerning the loan, and there was no basis for assuming that she understood what was happening, FmHA then instructed Petitioner to sign the promissory note and deed of trust. FmHA did this without attempting to discuss with her either Mr. Matthews' condition or the implications of signing the papers, although she was obviously the one who was going to have to deal with the consequences. In so doing, FmHA violated its own regulations in a way that worked to the detriment of Petitioner.

At the time that the FmHA employee and Mr. Woodall had Mr. Matthews sign the promissory note and deed of trust, FmHA regulations stated in part: "Persons having a disability of minority or mental

incompetency ... are not to execute the promissory note." 7 C.F.R. 1807.2(f)(8)(A-36). The regulations also stressed that care should be taken that borrowers understand what is involved. "The applicant shqould not be rushed into a decision but should be given time to make all necessary basic decisions." 7 C.F.R. 1801.4. The FmHA County Supervisor was required to determine whether there had been a significant change in the borrower's income or debts between the time of the loan application and the loan closing. 7 C.F.R. 1890t.2(b)(i).

The above-cited regulations provide the standard of care and parameters of the duties imposed on FmHA by Congress through the statutory framework. FmHA fell below that standard of care. If FmHA had obeyed its own regulations, the present problem could have been avoided. Under these circumstances, FmHA assumed at least a quasi-fiduciary responsibility toward Petitioner, and breached that duty.

Furthermore, where FmHA in effect chased Mrs. Matthews down - going to her home and instructing her to sign the documents, knowing that she had not been privy to either the application for the loan or any discussions with FmHA employees or the FmHA-designated attorney, FmHA assumed a duty toward Mrs. Matthews of the type recognized by this Court in Indian Towing v. United States, 350 U.S. 61 (1955). In Indian Towing, the Court held that the Coast Guard could be held liable for negligence in

operation of a lighthouse. The Court stated: 'One who undertakes to warn the public of danger and thereby induces reliance must perform his "good Samaritan" task in a careful manner.' This duty is expressed in Section 323 The Restatement (2d), Torts provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable acre to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

The undertaking to perform the activity establishes the duty on the part of the government. When the undertaking does harm, as it did here, it is the government, and not the victim, that should bear the burden. This "good Samaritan" basis of liability of government agencies has been applied to holding FmHA liable to its borrowers. See, e.g., Neal v. Bergland, 646 F.2d 1178 (6th Cir. 1981), aff'd sub nom. Block v. Neal, 103 S.Ct. 1089 (1983).

In light of the above law, and the facts alleged in Petitioner's Answer, it cannot be said "beyond doubt" that she "can prove no set of facts in support of [her] claim which would entitle [her] to relief," Conley v. Gibson, 355 U.S. 41, 45-46 (1957), and the government was not entitled to judgment on the pleadings.

CONCLUSION

The district court erred when it granted the motion of the United States for judgment on the pleadings. Reading the factual allegations of Ms. Matthews' Answer in the light most favorable to Ms. Matthews, and drawing all inferences which can reasonably be drawn in favor of Ms. Matthews, the grant of the government's motion for judgment on the pleadings should be denied and Ms. Matthews should be allowed to proceed to discovery.

For the reasons stated above, Ms. Matthews requests that the Court grant her Petition.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5;95-CV-137-BO(2)

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	ORDER
PEARL B. MATTHEWS, Defendant.	)	

This matter is before the undersigned on motion of the United States for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

The United States filed this foreclosure action after the defendant defaulted on her Farmers Home Administration loan, which loan was secured by deed of trust on property located in Lee and Harnett counties, North Carolina, and owned by the defendant. The loan was made in the amount of $88,000.00, and the note and deed of trust securing the loan were signed by both the defendant and her husband. The defendant's husband is now deceased.

The defendant, in her answer, alleges that the obligation is voidable, based on the incompetence of her husband at the time of the execution of the note and deed of trust, as well as violations

of regulations and fiduciary duties of the Farmers Home Administration, and undue influence by the attorneys involved in the transaction.

The facts presented in the parties' memoranda indicate that this loan was made to the defendant and her husband in December of 1978. Both the defendant and her husband who owned the property in question as tenants by the entireties, signed the promissory note and deed of trust. At the time of the execution of the relevant documents, the husband was in the hospital, suffering from chronic renal failure. Some three months later, the husband died from this disease. Subsequently, over the past thirteen to sixteen years, the defendant continued to make the payments on this loan, and reap the benefits therefrom.

The defendant now alleges that her husband was incompetent, due to dialysis dementia, and did not have the capacity to enter into the agreement. Further, the defendant contends that she was under duress at that time, given the deteriorating condition of her husband and the financial stress they faced.

The Court finds that the question of the husband's competence is irrelevant to the present action. Since the parties held the property as tenants by the entirety, upon the death of her spouse, the defendant became the owner in fee simple of the property encumbered by the FmHA loan. Furthermore, the defendant signed the promissory note and deed of trust in 1978 herself. Thus, she

obligated herself to the loan independently of whether her husband had the mental capacity to do so himself. At his death, the debt, the land, and the value of the loan became the defendant's responsibilty [*sic*] solely. She continued to pay on the debt until 1991, at which time she defaulted. Upon her default, the United States was entitled to accelerate the loan, and foreclose on the property.

The Court finds no merit in the defendant's affirmative defenses of undue influence and breach of fiduciary duty on the part of the Farmers Home Administration. The FmHA was not in a fiduciary relationship with the defendant, and breached no duty to the defendant. Nor do the facts indicate that the defendant was unduly influenced into signing the promissory note and deed of trust. The facts, viewed in the light most favorable to the defendant, indicate that she was in her home with her attorney at the time she executed the documents. While the Court recognizes that she was under emotional and financial stress due to her husband's medical condition, she has not shown that her attorney unduly influenced her decision, or took advantage of her emotional state of mind. Further, in order to show undue influence, the defendant must show that the FmHA or her attorney misused their position of trust in order to gain personally from the transaction she was influenced into making. The defendant has not presented

a forecast of such evidence in this case.

Accordingly, the government's motion for judgment on the pleadings is ALLOWED.

This 28th day of July, 1995.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 95-2613

PEARL B. MATTHEWS,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh,
Terrence W. Boyle, District Judge.
(CA-95-137-5-CV-BO)

Submitted: October 10, 1997

Decided: November 18, 1997

Before HALL and MICHAEL, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Stephen Alan Woodson, LAND LOSS PREVENTION PROJECT, Ahoskie, North

Carolina, for Appellant. Janice McKenzie Cole, United States Attorney, Norman Acker III, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Pearl b. Matthews defaulted on a Farmers Home Administration ("FHA") loan, and the government filed its complaint seeking judgment and foreclosure of the real property securing the loan. The district court granted the government's motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), and entered judgment against Matthews. Mathew [*sic*] appeals, contending that she was unduly influenced by Marshall Woodall, the closing attorney, and that FHA breached a fiduciary duty owed to her. Finding that Matthews can prove no facts sufficient to support her affirmative defenses, we affirm.

I.

In evaluating the propriety of a Rule 12(c) dismissal, we take the facts in the light most favorable to the nonmoving party -- Matthews. *See* *Ibarra v. United Sates*,, 120 F.3d 472, 474 (4th Cir. 1997). Matthews' husband suffered from chronic renal failure and was under a doctor's care when he applied for an FHA loan, which FHA approved on November

30, 1978. Matthews' husband underwent surgery related to his illness on December 21, 1978.

Woodall, the closing attorney, who had represented Matthews and her husband in other matters, and another FHA representative met with Matthews' husband at the hospital after his surgery to close the FHA loan. Woodall took the papers to Matthews, who was under a great deal of stress because of her husband's illness, and told her to sign them without explaining their legal effect. Matthews signed the documents even though she did not know her husband had applied for the FHA loan. On April 17, 1979, Matthews husband died of renal failure. Matthews continued to make payments on the FHA loan for twelve years before she defaulted. The government accelerated the loan on October 30, 1991.

The court granted the government's motion for judgment on the pleadings, finding the government was entitled to accelerate the loan and foreclose on the property after Matthews' default and rejecting Matthews' affirmative defenses of breach of fiduciary duty and undue influence. This appeal followed.

II.

We review de novo the district court's order granting judgment on the pleadings pursuant to Fed. r. Civ.. P. 12(c). *See* *Gustafson v. Jones*, 117 F.3d 1015, 1017 (7th Cir. 1997) (stating standard of review). Taking the nonmoving party's allegations as true, dismissal is inappropriate unless it

appears beyond doubt that the nonmoving party can prove no facts sufficient to support her claim for relief. *See* *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

On appeal, Matthews first claims that Woodall acted as an agent for FHA because he traveled to the hospital with another FHA representative to have her husband execute the loan papers and because he instructed her to sign the note and deed without explaining them to her. But Matthews' own pleadings belie her claim--she stated that Woodall acted as her agent in the loan transaction. The district court therefore properly found that Woodall was not acting as an agent for FHA.

Matthews also asserts on appeal that Woodall unduly influenced her because she was under stress as a result of her husband's illness and she placed a great deal of trust in Woodall. but Matthews' forecast of the evidence of undue influence is insufficient because she does not allege that Woodall abused his position of trust to gain from the transaction. *See* *Hardee v. Hardee*, 309 S.E.2d 243, 245 (N.C. 1983) (defining undue influence and outlining factors courts consider in undue influence analysis).

Matthews' final claim on appeal is that FHA breached a fiduciary duty owed to her. A debtor-creditor relationship, however, generally does not create a fiduciary relationship, *see* *In re*

Gertzman, 446 S.E.2d 130, 134 (N.C.Ct.App. 1994). And Matthews' forecast of the evidence--that FHA is a lender of last resort and her conclusory statement that FHA customarily enters a fiduciary relationship with its borrowers-- is insufficient to establish the existence of a fiduciary relationship. If there is no fiduciary relationship, there can be no breach of duty. *See Estate of Smith ex rel. Smith v. Underwood*, 487 S.E.2d 807, 812 (N.C.Ct.App. 1997).

III.

Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:95-CV-137-BO(2)

UNTIED STATES OF AMERICA, Plaintiff, v. PEARL B. MATTHEWS, Defendant.	)	JUDGMENT

THIS COURT ENTERED AN Order on August 1, 1995, granting the United States' Motion for Judgment on the Pleadings. The Clerk incorrectly filed a judgment dismissing the case, instead of granting the relief requested by the plaintiff, United States. Therefore, the judgment filed by the Clerk on August 1, 1995 is hereby vacated, and the Clerk is hereby ORDERED to file this judgment in lieu thereof.

Judgment is hereby entered against defendant Pearl B. Matthews in the amount of $120,369.12, plus interest accruing after December 16, 1994 at the daily rate of $18.2844 through the date of the entry of the Judgment, plus interest on the unpaid balance thereafter at the rate of 5.70% (the legal rate applicable as of the date of the filing of this Judgment) until the judgment is satisfied, plus a surcharge of ten percent pursuant to 28 U.S.C. Section 3011, et seq., plus all future costs.

The plaintiff's Deed of Trust for the property described in Exhibit A to

this Order shall be foreclosed and all right, title and interest to the property, including any equity of redemption rights or rights of any junior lienholders, shall be forever barred.

The United States Marshal is commanded to enter into and upon the defendant's land to seize the real property for the purpose of sale and to take any measures deemed necessary to secure the premises described. Further, the Marshal is ordered to sell the real property seized and possessed in a commercially reasonable manner, such manner to include any method that the United States Marshal Service commonly uses to dispose of seized assets or to foreclose on property. From the proceeds of sale, the United States Marshal shall pay any incidental expenses, commissions and fees incurred in conjunction with said sale, and shall remit the balance, up to the full amount due (as described in this Judgment above) to the United States of America.

After the sale of the premises, and as soon as the sale by the United States Marshal is complete and has been reported to the Court, the mortgagor(s) or person(s) in possession shall, within fifteen days of the date of the final report to the court, move from and give up the premises without any waste, damage or vandalism. Upon failure of any mortgagor(s) or person(s) in possession to vacate the premises within fifteen days of the date of final notice of sale to the court, the United States Marshal

is authorized, empowered, and directed to enter upon the premises and forcibly eject the parties therefrom, unless prior to such date, the mortgagor(s) or person(s) in possession have obtained from the Court an Order extending the time which mortgagor(s) or person(s) shall have to vacate said premises. The United States Marshal is also authorized to remove from the premises any furniture or other possessions of the mortgagor(s) or person(s) in possession, and any interference with the activities of the Marshal will be upon pain of contempt of Court.

SO ORDERED this 5th day of August, 1995.

TERRENCE W. BOYLE
United States District Judge

7 CFR Chapter XVIII - Farmers Home Administration Part 1807 Title Clearance and Loan Closing

Sec.
1807.1 General.
1807.2 Initial loan cases.

Section 1807.1 General

(a) *Farm Ownership, Rural Housing, and Individual Sol and Water Conservation loans.* This part contains the title clearance and loan closing authorities, policies, and procedures for all Farm Ownership, Rural Housing, and Individual Soil and Water conservation loans, except loans in connection with transfers and assumption agreements or credit sales by the Farmers Home Administration.

(b) *Other types of loans and transactions.* Title clearance and closing of all other loans and transactions involving real estate security will be handled as provided in regulations applicable thereto.

(c) *Definition of terms.* As used in this part "title clearance" includes title examination and title insurance; "mortgage" includes deed of trust and deed to secure debt; "borrower" means the loan applicant; "title insurance company" includes its local representatives, agents, and attorney; and "Farmers Home Administration" refers to the United States of America acting through the Farmers Home Administration. Also, a

loan is considered to be closed when the mortgage is filed for record.

(d) *Methods of title clearance and closing of transactions.* Title clearance and loan or transfer closing will be handled by title insurance companies approved by the State Director and/or attorneys designated by the State Director with the exception of Rural Rental Housing (RRH) loans to profit, limited profit, and nonprofit organizations who may use their own attorney in accordance with the requirements of Section 1822.95(a) of this chapter. When private attorneys are to be used in connection with obtaining title insurance, the State Director may, by a State Supplement, require such services to be performed by designated attorneys if that is acceptable to the title insurance company(s). When the services are available from more than one source, the borrower, or seller, or both; or the transferor or transferee, or both; will choose the source to be used.

(1) The services of the Office of the General Counsel (OGC) will be used (i) in any county or area where the State director is unable to obtain the services of a designated attorney or a title insurance company, or a combination of both; (ii) any exceptional or complex case or situation in which the State Director determines, with the advice of OGC that it would be more reasonable or practical to use OGC's services; (iii) in any case involving a mortgage on a leasehold; and (iv) in all credit sales

with or without a subsequent loan or transfer.

(i) When OGC services are to be used on a county or area basis, the State Director, with the advice of OGC, will determine whether the title clearance and closing of the transaction will be accomplished with the assistance of a local attorney, a title insurance company representative or combination thereof, or other method. After such a determination has been made, the State Supplement will specify the county or area involved and the method to be used.

(ii) When OGC services are to be used in an exceptional or complex case or situation, title clearance will be handled in the manner in which OGC determines most appropriate.

(e) *Approval of attorneys.* The State Director is responsible for approving loan closing attorneys within his jurisdiction without any discrimination whatsoever. Any attorney who wishes to be approved should apply to the State Director on Form FmHA 427-14, "Agreement to provide Loan closing Services." This form must be property completed and executed. The State Director will approve any qualified attorney who applies provided the attorney complies with the bonding and insurance requirements prescribed in Section 1890t.2 (a)(1)(i) and (iv) of this Chapter. This approval will be fore the county or area n which the attorney can provide the legal services required of the attorney by this Instruction.

Only in a rare case will there be less than two attorneys designated in a county. The State Director, at his discretion may consult with the Office of te General Counsel and/or the local or State bar association as to the professional qualification of a proposed designated attorney. In addition, a borrower, who prior to application for a loan has retained an attorney, may request that the attorney be approved for his loan. Such approval will be given for closing that particular loan by the County Supervisor if the attorney has the required bonding and insurance and to the bet of the County Supervisor's knowledge the attorney is in good standing with the bar association. Subpart C of Part 1918 of this chapter provides the method by which attorneys may be debarred.

(f) *Approval of title insurance companies.* The State Director will approve any company issuing satisfactory title insurance policies, licensed to do business in the state, which has or will agree or states in writing (by exchange of letters, publication of services, or otherwise) that it can validly and will furnish for a stated charge, a title insurance binder, a mortgagee or joint protection title insurance policy (hereinafter referred to as "mortgagee title policy"), and all of the related services prescribed herein, provided:

(1) The mortgagee title policy will be in such form and will contain only such standard types of exceptions as are approved in advance by the State Director

with the advice of the Office of the General Counsel.

(2) The title insurance company understands that the request for insurance and services will be made by sellers or borrowers and that no cost of insurance or services will be charged to or paid by the Farmers Home Administration on *[sic]* an insured lender.

(3) The title insurance company representative who supervises the closing is authorized to receive, and give receipts for, the company's charges.

(g) *Costs of title clearance and loan closing.* Neither the Farmers Home Administration nor an insured lender will be responsible for any costs of title clearance or loan closing. The costs of title clearance and loan closing will include any costs of abstracts of title, land surveys, attorney's services, title insurance, obtaining curative material, notary fees, documentary stamps, recordation costs, and other expenses necessary to make the loan. The borrower or the seller, or both will be responsible for payment of all costs of title clearance and loan closing and will arrange before the loan is closed for such payment. In cases involving the purchase of land, the option should contain their agreement.

(h) *County Supervisor's responsibilities.* The County Supervisor will:

(1) Provide the borrower, and seller

if land is being acquired, with the name and address of the designated attorney and approved title insurance companies.

(2) Furnish to the selected designated attorney or title insurance company or *[sic]* Form FmHA-826 or FmHA 427-4, "Transmittal of Title Information," all the information and documents called for therein concerning the loan to be made or insured, including any waivers, easements, and so forth, and Farmers Home Administration forms or other documents necessary to effect title clearance and loan closing.

(i) *Ordering title examination or insurance.* Application for title clearance and loan closing services will be made by the borrower or the seller, or both, to a *[sic]* insurance company selected by the loan applicant or seller, or both. Application for title insurance will be made on forms furnished by the company and will request issuance of a form of mortgagee title policy approved by the State Director in an amount at least equal to the amount of the loan. The borrower also may obtain an owner's policy or a combination policy if he desires. The mortgagee named in the policy will be the "United States of America," except that if a direct loan is being made with State Rural Rehabilitation Corporation trust funds, the name of the mortgagee will be "United States of America, Trustee of the assets of (name of State Rural Rehabilitation Corporation)." The borrower will instruct the designated attorney or title

insurance company to deliver the preliminary title opinion or title binder to the County Supervisor.

(j) *Settlement Statement.* Form FmHA 440.59 (HUD-1), "Settlement Statement," will be used as the statement of closing costs for all loans and credit sales subject to the provisions of Section 1901.406(c) of this chapter.

Section 1807.2 Initial loan cases.

(a) *Services.* Title clearance and loan closing services to be provide designated attorneys and title insurance companies will include examining title; preparing, obtaining, or approving simple curative material, conveyances, and security instruments; advising borrowers, and sellers if land is being acquired, regarding the adequacy of the legal description of the farm; issuing either preliminary and final title opinions or certificates of title, or title insurance binders and mortgagee title policies; and performing other legal services necessary to close the loan properly. The designated attorney or title insurance company will advise the County Supervisor, upon his request, as to the nature and legal effect of outstanding interests or title defects to assist him in determining whether such outstanding interests or defects affect the value of the farm or its operation and which must be corrected in order for the Government to obtain from the borrower a lien of the required priority upon a title merchantable in fact. The designated

attorney or title insurance company will be expected to perform these services with diligence and dispatch so that the loan can be closed without unnecessary delay.

(b) *Examination of title.* At the proper time, the County Supervisor will notify the borrower, and seller if land is being acquired, that they should employ the designated attorney or title insurance company to examine title and perform the other legal services in connection with title clearance and loan closing, and that they should furnish to the designated attorney or title insurance company any needed abstracts of title or other title evidence for use to the extent possible to reduce the cost to the borrower.

(1) *Scope of search.* The designated attorney or title insurance company will determine whether there are any judgments or pending suits in State or Federal courts, Federal or State tax claims (including taxes which under State law may become a lien superior to a previously attaching mortgage lien), or bankruptcy, insolvency, or probate proceedings, involving any part of the farm, whether already owned by the borrower or to be acquired with loan funds, or involving the borrower, or the vendor in a land acquisition case which would prevent the Farmers Home Administration from obtaining an enforceable mortgage lien of the required priority. Title examination upon which this determination will be based will

include such searches of the records, or certificates from the clerks of the appropriate United States district courts as may be necessary in the particular State.

(2) *Period of search.* When title insurance is obtained, title examination will cover such period of time as the title insurance company determines necessary in order to insure the Farmers Home Administration mortgagee interest in the title. In other cases the title search must cover the shortest period necessary to include one of the following:

(i) A warranty deed from a party other the United States which has been of record for at least 40 years.

(ii) A Farm Ownership, Farm Housing, or individual Soil and Water Conservation (not Water Facilities) security instrument.

(iii) A patent or deed from the United States, except that where such patent or deed recorded within 40 was issued under the Federal homestead or reclamation laws or where title is held under but a patent or deed has not been issued under such laws, the search must cover either 40 years or the period necessary to include the entry or purchase contract whichever is shorter.

(c) *Preliminary title opinion or title insurance binder.* When the services of a designated attorney are used, he will issue his preliminary title opinion to the County Supervisor. The preliminary title opinion will be on Form

FmHA-312 or FmHA 427-9, "Preliminary Title Opinion," or if that form is not legally sufficient in a particular State, the State Director with the advice of the Office of the General Counsel, may approve a satisfactory State form. When title insurance is obtained, the title insurance company will furnish the County Supervisor a title insurance binder disclosing the defects in and encumbrances against the title, the conditions to be met to make the title insurable, and the curative or other actions to be taken before loan closing. The binder also will include a commitment to issue an approve mortgagee title policy in an amount at least equal to the amount of the loan.

(d) *Title exceptions.* Upon receipt of the preliminary title opinion or title insurance binder, the County Supervisor will:

(1) Check the opinion or binder carefully to see that it is complete in all respects. If any required information is omitted or if the standard form of opinion or binder is amended, the County Supervisor will not accept the opinion or binder but will return it for completion or correction. If the designated attorney or title insurance company is unable or unwilling to complete or correct it, the County Supervisor will send it with a full explanation to the Office of the General Counsel, which may approve or disapprove it.

(2) Determine that the legal

description covers all the property rights, including water rights, intended to be taken as security and whether the opinion or binder shows exceptions, reservation, encumbrances, or defects which must be corrected, eliminated, or waived. The County Supervisor will consult with the designated attorney, title insurance company, or the State Director when he needs advice in making these determinations.

(3) Waive any exceptions which he or the State Director determines will not affect adversely the suitability, security value, or successful operation of the farm.

(4) Submit any exceptions which will affect adversely the title to the farm or its suitability, security value, or successful operation to the State Director. The State Director may waive them conditionally. If necessary, the County Committee will reconsider the suitability of the farm for a loan and prepare a new certification. If it is favorable and the conditions imposed in the State Director's waiver can be met, the County Supervisor will inform the designated attorney or title insurance company.

(e) *Preparation of deeds, mortgages, and curative instruments.* The designated attorney or title insurance company will prepare or approve deeds, mortgages, affidavits, releases, and other simple curative document necessary for title clearance and loan closing. Farmers Home Administration mortgage forms will be

used in all cases and other Farmers Home Administration forms, whenever possible.

(1) *Types of estates - joint tenancy, entirety, or other.* (i) Where land is acquired with loan funds and the State law permits, both the title to the land being acquired and the title to any part of the farm already owned will be vested in the borrower and spouse with right of survivorship, or at the election of the borrower as community property in a State having community property laws under which all community property goes to the surviving spouse when the other spouse dies without disposing of his or her share by will, subject to the following exceptions:

(a) Upon written request of the borrower in any case in any State, title may be vested in any way which will permit obtaining the mortgage lien.

(b) When one spouse is under disability of minority or mental incompetency and it is necessary under State law in order for the Farmers Home Administration to obtain a valid lien not subject to disaffirmance and enforceable against the security property including all interests therein required to be mortgaged, title will be vested in the eligible spouse only.

(C) When the eligible spouse is a citizen and the other spouse is a noncitizen, title will be vested only in the citizen, if possible under State law.

(ii) In all other cases title may be held in any manner which will permit obtaining the required mortgage, except

that paragraph (e)(i)(c) of this section will apply in noncitizen cases.

(2) *Preparation of deeds.* Deeds will be prepared as follows:

(i) Except for conveyances from the United States and subject to the following additional exceptions, conveyance of title to borrowers must be by general warranty deed. The usual and appropriate form of deed may be accepted from fiduciary or straw parties. Upon the prior approval of the Administrator in any case where the seller refuses to give a general warranty deed, a quitclaim or special warranty deed may be accepted if the title it coneys is approved by the Office of the General Counsel as free from substantial objections. If the grantors or their predecessors in title acquired the property by conveyance from the Farmers Home Administration or one of its predecessor agencies, a special warranty deed may be used warranting against title defects arising subsequent to that conveyance.

(ii) The deed should show the exceptions, reservations, liens, and other encumbrances subject to which the loan is being made. Where customary, the legal description of the land should include a provision further identifying the security as that described in an earlier conveyance identified by date, parties, and recording data.

(iii) Each deed should recite a legal consideration.

(3) *Preparation of mortgage.* The designated attorney or title insurance

company will obtain from the County Supervisor the proper type of Farmers Home Administration mortgage form, which will be prepared as follows:

(i) *Forms.* Form FmHA-127. ___, or FmHA 427-2 (State) will be used for all direct loans. Form FmHA-177.___, or FmHA 427-1(State) will be used for all insured loans. Form FmHA-137 or FmHA 427-3 (State) Rider will be used as attachment to Form FmHA-127.___ or FmHA 427-2 (State) or FmHA-177.___ or FmHA 427-1 (State) when a loan is made to a homestead entryman or to a contract purchaser of a farm unit from the Bureau of Reclamation.

(ii) *Number of copies.* Ordinarily it will only be necessary to prepare the original and one copy of the mortgage, the original to be recorded in the public records and then retained n the Farmers Home Administration county Office and the copy to be delivered to the borrower. An additional copy will be necessary in States where the original is retained by the recorder. Additional copies also will be necessary in some cases in which the interests of other parties are involved. The county Supervisor will conform the needed copies and distribute them to the proper parties at the time of loan closing or as soon as possible thereafter.

(iii) *Persons required to execute mortgage.* The mortgage will be executed by the borrower and all other persons having interests in the farm which are required in each case to be mortgaged.

Persons required to sign the mortgage should use exactly the same names in which they hold title, and each person who signs the promissory note and the mortgage should sign both with exactly the same name.

(iv) *Title exceptions.* The mortgage must describe specifically by reference or other method sufficient under State law, the exceptions, reservations, liens, and other encumbrances subject to which the loan is being made, except that any exceptions and reservations so numerous or with descriptions so lengthy as to increase substantially legal or recording costs, may be described by use of a general statement similar to the following: "Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record."

(v) *Releasing or retaining existing mortgages in refinancing cases.* If any outstanding Farmers Home Administration real estate loan is not being refinanced, the mortgage with respect thereto will not be superseded or release; the mortgage, the note therein secured or described, and any related mortgagee title policy will remain in force. When there is an outstanding Farmers Home Administration direct or insured real estate mortgage against the property and the loan which the mortgage secures is being refinanced with the current loan, the mortgage for the loan being refinanced will be superseded and will be

released at the time of loan closing, unless it is legally necessary to keep the existing mortgage in effect in order to have a valid lien.

(vi) *Notes to be described in mortgages.* (a) In the case of an insured loan, only the note evidencing the insured loan being made will be described in the mortgage, and under no circumstances will a direct note and an insured note be described in one mortgage. If, at the time an insured loan is being made, any other kind of loan (whether insured or direct) is being made simultaneously or additional security is desired for a loan already outstanding, it will be necessary to take a separate mortgage on the form appropriate for the other loan.

(b) When a direct loan is being made, the note will be described in the mortgage. When two or more direct loans are made to the same borrower on the same security an closed simultaneously, only one mortgage will be taken and the notes for all such loans will be described in the mortgage. Notes evidencing existing direct loans to borrowers receiving a new direct loan will also be described in the new mortgage unless prohibited by Farmers Home Administration regulations or policies or deemed by the loan official inadvisable in the particular case. When a subsequent direct Farm Ownership, Rural Housing, or Soil and Water Conservation loan is being made without refinancing the initial loan, the initial loan an subsequent loan notes will be described

in the mortgage, except that, where a subsequent loan mortgage is being taken without covering additional land, and describing the initial loan note would result in a higher title insurance premiums for the subsequent loan, the State Director may allow the subsequent mortgage to additionally secure the initial loan by cross reference to be inserted in the mortgage rather than by description of the initial loan note; a mortgage taken from a transferee will describe the assumption agreement executed by the transferee instead of the earlier related note as the instrument secured, and the term "note" is to be interpreted accordingly in this Part 1807 of this chapter.

(c) For a direct Farm Ownership or a Farm Housing loan, the "Due date of final installment" to be shown in the mortgage, and for an insured Farm Ownership loan, the date to be inserted in "the final installment being due on _____, 19___," is determined by adding the number of years over which the loan is payable to the date of the promissory note. For all other direct loans and for insured Soil and Water Conservation loans, it is the final installment date show on the promissory note.

(vii) *Alteration of mortgage form.* A mortgage form may be altered by deletion, revision, or addition pursuant to authorization by the State Director or in a special case where it is necessary in order to comply with the terms of loan approval prescribed in accordance with

pertinent Farmers Home Administration regulations. No other alterations in the printed mortgage forms may be made without prior approval of the National Office.

(f) *Loan closing.* The designated attorney or the title insurance company will arrange with the County Supervisor, the borrower, the seller if land is being acquired, and other necessary parties for the time and place of loan closing. The designated attorney or the title insurance company will assist with the loan closing to determine that the Farmers Home Administration obtains a valid mortgage lien on the property of the priority required by the Farmers Home Administration, subject only to such other encumbrances, reservations, and exceptions as have been permitted by the County Supervisor or the State Director. Where a second mortgage Farm Ownership loan is being made simultaneously with another Farmers Home Administration loan (both subject to a prior lien), the other Farmers Home Administration loan will be deemed secured by a third lien.

(1) *Disbursement of loan funds.* Loan funds will not be disbursed prior to filing of the mortgage for record. However, when necessary, loan funds may be placed in escrow before the mortgage is filed for record for disbursement after it is filed. Loan funds for the payment of a lien may be disbursed only upon receipt of a discharge, satisfaction, or release (or assignment where necessary to protect the interest

of the Government), except that funds may be disbursed, after the mortgage is filed for record, to a reputable lienholder in reliance on his written agreement to deliver the instrument upon receipt of a specified sum.

(2) *Title examination and liens or claims against borrowers.* The designated attorney or title insurance company will examine the title and will check for liens or claims against he borrower from the termination date of the preliminary title examination to and including the time of recording the current mortgage. If there are no entries of record ruing the period except the documents required in connection with title clearance and any partial release or subordinations previously approved by the Farmers Home Administration, the loan may be closed. If there are any other entries of record during this period, the loan will not be closed until such entries have been cleared of record, or administratively waived if appropriate. The designated attorney or title insurance company should advise the County Supervisor of the nature of such intervening instruments, the legal method by which they may be eliminated, and the effect they may have on obtaining a valid mortgage of the priority required.

(3) *Certificate of inspection.* The County Supervisor will prepare a certificate of inspection which will show the condition of the farm at or shortly before the time of loan closing. Form FmHA-874 or FmHA 427-7, "Certificate of

Inspection," will be used, except that if it is not satisfactory for use in a particular state, the State Director may approve a State form using the same title. The designated attorney or title insurance company will see that the certificate is executed by the County Supervisor or by some other Farmers Home Administration employee, including County Committeemen, acquainted with the facts.

(4) *Taxes and assessments.* The designated attorney or title insurance company will ascertain that all taxes and assessments against the property which are due and payable are paid at or before the time of loan closing. Certificates or receipts should be produced from the taxing authorities to show that taxes or assessments which are due and payable have been paid and, if possible, such certificates or receipts should be kept in the borrower's County Office loan docket with the other loan papers. Where the seller and the borrower have agreed to pro-rate taxes or assessments which are not yet due and payable for the year in which the loan closing takes place, the seller will pay his portion at the time of loan closing. If the taxes and assessments cannot be paid at the time of loan closing, the amount of taxes and assessments to be paid by the seller will be deducted from the selling price of the land.

(5) *Prior lienholder's agreements.* If other persons hold liens, purchase contracts, or other security interests, herein called liens, which will remain

against the property asa prior lien after the loan is closed, it may be necessary for them to limit their rights thereunder in certain cases.

(i) Forbearance agreements will be obtained where the County Supervisor determines that protection of the Government's interest requires the prior lienholder to agree to one or more of the following:

(*a*) Not to declare his lien in default or accelerate the indebtedness thereunder for a specified period without the written consent of the State Director.

(*b*) Not to make advances for purposes other than taxes, insurance, or payments on other prior liens when his lien secures future advances which the designated attorney, title insurance company, or Office of the General Counsel determines would, under State law, have priority over the mortgage being taken or any mortgage already held or insured by the Farmers Home Administration.

(*c*) To consent to the Farmers Home Administration's making the loan and taking the mortgage, if the prior lien prohibits such loan or mortgage without consent.

(*d*) Not to enforce without the written consent of the State Director as long as the Farmers Home Administration has an interest in the property, any unsatisfactory payment terms or other specified provisions of the prior lien which in the opinion of the county Supervisor would endanger the security

position of the Farmers Home Administration.

(ii) Notice of foreclosure or assignment agreements will be obtained in those states whose laws permit junior liens of private parties to be extinguished by foreclosure of a prior lien without the junior lienholders being made parties or being given actual notice.

(iii) In a State in which forbearance agreements only are needed, they will be obtained on form FmHA-446 or FmHA 427-8, "Agreement with Prior Lienholder," or, if that form is not legally satisfactory for use in a particular State, on another form approved by the Farmers Home Administration. When only notices of foreclosure or assignment are required, a separate form for such purpose will be used. When both forbearance agreements and notice of foreclosure or assignment are required, Form FmHA-446 or FmHA 427-8 may be amended in order to serve both purposes or a substitute form approved by the Farmers Home Administration may be used for both purposes, or Form FmHA-448 or FmHA 427-8 may be used and the notice agreement obtained on a separate form approved by the Farmers Home Administration.

(iv) When a forbearance or notice agreement is required, the designated attorney or title insurance company will determine at the time of loan closing that it is properly completed and executed and, if required by State law,

sealed and witnessed; also, that it is properly acknowledged by the prior lienholder and recorded, if recording is required by the Farmers Home Administration.

(6) *Affidavit of sellers.* If land is being acquired, the designated attorney or title insurance company may require that an affidavit of sellers be properly completed and executed at, or shortly prior to, the time of loan closing. This affidavit may be on Form FmHA-375 or FmHA 427-6, "Affidavit of Sellers," or if that is not legally sufficient in a particular State, a substitute form approved by the Farmers Home Administration may be used. The affidavit will not be recorded, unless State law permits and the designated attorney or title insurance company considers it necessary.

(7) *Deeds and curative material.* The designated attorney or title insurance company will determine that deeds, releases, and curative material are properly completed, executed (sealed and witnessed if required by State law), acknowledged, and filed for record at the proper time.

(8) *Promissory note.* The designated attorney or title insurance company will determine that the promissory note is properly completed and executed. The borrower and any person whose signature on the note is necessary to obtain the required mortgage lien will sign the note. In addition, the borrower's spouse, even where not required to sign

the note for lien purposes, will sign the note unless he or she is under disability of minority or mental incompetency or is a noncitizen or is excused from signing the note for substantial reasons deemed by the State Director to be justifiable. The note will be dated the date the mortgage is filed for record, except that it may be executed and dated earlier if execution on that date is impossible and the borrower is advised that interest will accrue on the loan from the date of the note.

(9) *Assignment of future income.* If Form FmHA-253 or FmHA 443-16, "Assignment of Income from Real Estate Security," is required in a particular case, the County Supervisor will prepare the form and have it available for execution by the borrowers at the time of loan closing. The designated attorney or title insurance company will see that the form is properly completed, executed (sealed and witnessed if required by State law), and acknowledged by the borrowers.

(10) *Mortgage.* The designated attorney or title insurance company will see that the mortgage is properly completed, executed, sealed and witnessed if required by State law, acknowledged, and filed for record. The mortgage will be executed and dated the date of the note, except that if that is impossible for one or more of the signers of the mortgage, it may be executed on a different date but not before the date of the note.

(11) *Affidavit of borrowers.* The

designated attorney or title insurance company may require that an affidavit of borrowers be properly completed and executed at the time of loan closing. This affidavit may be on form FmHA 427-5, "Affidavit of Borrowers," or if that is not legally sufficient in a particular State, on another form approved by the Farmers Home Administration. Statements in the form should be modified as necessary to make them factually correct. The affidavit will not be acknowledged and recorded unless State law permits and the designated attorney or title insurance company considers it necessary.

(12) *Other services of designated attorneys and title insurance companies.* The designated attorney or title insurance company will assist and advise the County Supervisor, when necessary, in the preparation, completion, obtaining execution, acknowledgment, recordation, and so forth, of documents required in particular cases. Standard FmHA forms will be usec for such purposes whenever possible. The designated attorney or title insurance company will maintain close commurication with, and keep the County Supervisor advised, as to the progress of the title clearance and preparation of loan closing material.

(13) Final opinion or mortgagee title policy. - (i) *Final opinion.* As soon as possible after loan closing the designated attorney will issue his final opinion to the County Supervisor. The final opinion will be on form FmHA-313 or FmHA 427-10, "Final Title Opinion," of if

that form is not legally sufficient in a particular State, on another form approved by the Farmers Home Administration. Since issuance of final opinion will not be held up pending return of recorded instruments, it may not be possible for the final title opinion to show full recording information in all cases, but it should at least show the time of filing, filing number, and as much other recording information as is available. Attached to the final opinion will be all required documents then available, including any which the County Supervisor had furnished to the designated attorney and were not previously returned. With the approval of the designated attorney, arrangements may be made with the recorder to forward or deliver instruments to the proper parties after recordation.

(ii) *Mortgagee title policy.* As soon as possible after loan closing the title insurance company will issue to the County Supervisor the mortgagee title policy in favor of the Government as it appears as mortgagee. The policy shall be subject only to approved standard exceptions and such outstanding encumbrances, exceptions, and reservations as were waived administratively in writing by the Farmers Home Administration.

7 CFR Part 1890t - TIMESAVING AND PROGRAM IMPROVEMENT

Sec. 1890t.2 Procedure for implementation by May 31, 1972.

(a) *Use of designated attorneys and title insurance companies for loan closing.* (1) Each State Director will authorize designated attorneys or approved title insurance companies to close real estate loans including loans secured by leasehold but not government-acquired property and transfers specified in Section 1807.1 of this chapter (such loans and transfers being hereinafter referred to as "loans" or "loan closings") and will give them responsibility for disbursing loan funds including any funds of a private investor in the insured note involved and directions for disbursing any funds the borrower is required to furnish in connection with the loan, provided:

(i) The designated attorney has liability insurance for errors and omissions in the amount of at least $100,000 and has a fidelity type bond of at least $10,000. If other associates or secretarial staff members have access to the funds in the escrow account, each such individual must have a fidelity bond to cover any fraudulent or dishonest act.

(ii) A title insurance company must, in addition to the requirement set forth in Section 1807.1 of this chapter provide to the FmHA evidence of its

financial condition, including appropriate balance sheets and profit and loss statements, to enable the FmHA to determine that it is in a financial position to cover any probable loss. Also, the title insurance company must furnish evidence that it has fidelity coverage of at least $50,000 on each individual who will have access to the loan funds for closing FmHA loans. Where State law imposes other requirements giving FmHA at least equivalent protection in the opinion of the State Director with the concurrence of the Office of the General Counsel (OGC), the State Director is authorized to approve title insurance companies on the basis of State law.

(iii) Form FmHA 427-18, "Fidelity Bond for Loan Closing Attorneys," will be furnished to the designated attorney for his use in obtaining the required bond. However, if the Escrow Agent already has a fidelity type bond, the County Supervisor should review a copy of it to make sure it is comparable to the provision of Form FmHA 427-18. If the County Supervisor is unable to determine whether that bond meets FmHA requirements he should refer it to the State Office for advice.

(iv) The State Director will approve the application by endorsing his approval on a conformed copy of the application and will notify the designated attorney or title insurance company of his approval by returning the approved copy. Such an attorney or

company so approved may be referred to hereinafter as the "Escrow Agent."

(2) If an acceptable Escrow Agent is not available or if there is a low volume of real estate loans and the Escrow Agent's cost would be relatively high for each case because of the cost of the bonds, loans in that county will be closed in accordance with Part 1807 of this chapter in the usual manner. In a county where complicated problems will be encountered by the Escrow Agent disbursing the total funds, the State Director may authorize the County Supervisor to use the supervised bank account and send to the Escrow Agent only the funds required to be disbursed at loan closing. In any county where Escrow Agents are not being used, or where the Escrow Agent will disburse only a portion of the funds, summary statements of the reasons will be forwarded by the State Director to the National Office.

(3) Each State Director will prepare State requirements as necessary to implement loan closings under this Part 1890t. The State requirement will prescribe which originals and how many copies of specified forms must be executed or conformed and which originals and/or copies must be returned to the County Office after completion of the loan closing and any other essential information that is not contained in Part 1807 of this chapter, including the requirements of paragraph (a) of this section.

(4) Form FmHA 427-15, "Loan Closing

Instructions," will be used by the County Supervisor to transmit the necessary forms, documents and instructions to the Escrow Agent.

(5) For any loan closing for which an Escrow Agent will be responsible no FmHA personnel will be present unless authorized by the State Director on an individual case basis.

(6) Each State Director will see that all designated attorneys and approved title insurance companies are fully informed of what their responsibilities are expected to be if they apply for and receive approval as Escrow Agents under this Part 1890t, and that they are given an opportunity to make application on Form FmHA 427-14 for such approval. Designated attorneys and title insurance companies which do not apply within a reasonable time or are not approved will be removed from the lists of designated attorneys and approved title insurance companies except in cases covered by subparagraph (a)(2) of this section.

(b) *County Supervisor's responsibilities in loan closing.* The County Supervisor will:

(1) See that the requirements for property insurance set forth in Part 1806 of this chapter are complied with, including a receipt for payment of 1 year's insurance, and see that the applicant's income and debts have not increased substantially since the loan docket was developed. This will be done before the loan-closing instructions are

issued and by use of form FmHA 427-16, "Notification of Loan Closing." If the applicant's income or debts have changed substantially, or if more than 90 days have passed since the loan was approved, the applicant will be required to contact the county Supervisor immediately for a review of his situation.

(2) Furnish to the Escrow Agent the check made payable to the borrower and all forms, documents, and instructions necessary for closing the loan.

(3) Require the Escrow Agent to furnish FmHA with a receipt on Form FmHA 427-17, "Loan Closing Statement," showing how the loan funds were disbursed.

(4) Review the material sent to him by the Escrow Agent to see that the loan was properly closed and that all funds were disbursed as instructed.

(c) *Escrow Agent's responsibilities in loan closing.* The Escrow Agent will:

(1) Apply for approval and agree to close loans and disburse funds by submitting to the State Director an executed completed original and one copy of Form FmHA 427-14.

(2) Agree to furnish legal services, close loans, and disburse funds in accordance with Part 1807 of this chapter and other instructions to be received from the County Supervisor or other FmHA official.

(3) Disburse loan funds and any funds furnished by the borrower as required in accordance with loan closing conditions. Loan checks received by the Escrow Agent will be endorsed by the loan

applicant or his bonded agent and deposited by the Escrow Agent in an escrow account on the day of the loan closing and disbursed in accordance with Part 1807 of this chapter and other instructions received from FmHA. The loan check will not be endorsed or deposited in the escrow account until the Escrow Agent has determined that the loan can be closed. Funds will not be disbursed from the escrow account until the mortgage is filed for record. Any balance of funds to be used to complete planned development will be deposited in a supervised bank account (which is a bank account on which checks must be signed by the borrower and counter-signed by authorized personnel) by the Escrow Agent after obtaining the borrower's signature on Form FmHA 402-1, "Deposit Agreement," that has been completed by the County Supervisor and submitted with instructions to the Escrow Agent. The check used for withdrawing the funds from the escrow account will be made payable to the borrower and endorsed by him or his bonded agent in the following manner - "For deposit only in my countersignature bank account in the (name of bank and address when necessary for identification) pursuant to Deposit Agreement with the Bank and the United States dated _____."

(4) After making disbursements and collections to carry out title clearance and closing, the closing agent will make an accurate accounting of costs and prepare Form FmHA 440-59 (HUD-1),

"Settlement Statement."

(i) During the business day immediately preceding the date of settlement, the closing agent, if requested by the applicant, must permit the applicant to inspect the Settlement Statement, completed for those items which are then known to the closing agent.

(ii) A copy of the Settlement Statement will be given to both the borrower seller at the time of closing or settlement or will be mailed as soon as practicable if the borrower or seller are not present at closing.

(d) *Discontinuance of having OGC issue closing instructions.* It has been determined that it is not more reasonable or practical to have OGC issue closing instructions in order to avoid having designated attorneys and/or title insurance companies close or assist in closing loans. Therefore, for any State where closing instructions are being routinely issued by OGC for all loans of the types specified in Section 1807.1 of this chapter, the State Director will approve a sufficient number of designated attorneys and/or title insurance companies to make OGC issuance of such closing instructions unnecessary, and will discontinue using OGC for this purpose, except when unusual circumstances of any individual case call for it. If the State Director cannot find a sufficient number of qualified available attorneys and/or title insurance companies to obviate the need

for closing instructions being issued by OGC routinely, he will report the facts to the National Office.

(e) *Issuance of State requirements.* A State requirement will be prepared as necessary to implement the loan closing, disbursement of funds, and the furnishing and completion of forms. Also, if any form required for loan closing is not legally satisfactory for use in a particular State, a State form with the same name and number as the FmHA form will be developed and used.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil No. 5:95-137-CV-BO(2)

UNITED STATES OF AMERICA,
Plaintiff,

vs. ANSWER

PEARL B. MATTHEWS,
Defendant.

NOW COMES the defendant, Pearl B. Matthews, by and through counsel, and in answer to the plaintiff's complaint, alleges and says

1. The allegations contained in paragraph 1 of the complain are admitted.

2. The allegations contained in paragraph 2 of the complaint are admitted.

3. The allegations contained in paragraph 3 of the complaint are denied.

4. It is admitted that defendants [*sic*] signature appears on the document referred to in paragraph 4 of the complaint and annexed thereto as Exhibit B. The remaining allegations contained in paragraph 4 of the complaint are denied. It is specifically denied that said promissory note was executed under seal.

5. The allegation contained in paragraph 5 of the complaint is denied.

6. The allegation contained in paragraph 6 of the complaint is denied.

7. Defendant is without sufficient information and belief to admit or deny the allegation contained in paragraph 7 of the complaint. The same is therefore denied.

8. The allegation contained in paragraph 8 of the complaint is denied.

9. The allegations contained in paragraph 9 of the complaint are denied.

10. the allegations contained in paragraph 10 of the complaint are denied.

FACTUAL ALLEGATIONS

11. On or about September 17, 1978, Mr. William Preston Matthews (hereinafter "Mr. Matthews"), the husband of defendant, applied to the Farmers Home Administration (hereinafter "FmHA") for an Economic Emergency Loan, which was available at that time pursuant to Title 7 of the Code of Federal Regulations, Section 1945.101 et seq. the amount of the loan applied for was eighty-eight thousand and 00/100 dollars ($88,000.00). Defendant did not sign this application.

12. Aforesaid loan was requested to refinance other obligations of Mr. Matthews, most of which were incurred in the operation of the Matthews' farm.

13. Upon information and belief, none of the obligations which Mr. Matthews sought to refinance were in default at the time Mr. Matthews applied for the Economic Emergency Loan.

14. On or about November 30, 1978. FmHA approved Mr. Matthews' loan

application.

15. At all time [*sic*] relevant to plaintiff's defenses and claims for recoupment, Mr. Matthews was under doctor's care for chronic renal failure.

16. On December 1, 1978, Mr. Matthews was admitted to Duke University Medical Center (hereinafter "Duke") for complication resulting from chronic renal failure. Mr. Matthews had a major motor seizure on that date immediately after dialysis was performed at his home.

17. Upon admission to Duke, the Attending physician noted that Mr. Matthews displayed symptoms of dialysis dementia.

18. Upon information and belief, dialysis dementia is a condition of the central nervous system which was at the time a common complication among kidney patients who had been treated with hemodialysis for more than three years.

19. Upon information and belief, symptoms of dialysis dementia include: Disorders of memory, lapses in concentration, alteration of personality, and psychosis.

20. Upon information and belief, on December 21, 1978, Mr. Clyde Patterson (hereinafter "Patterson"), then an employee of the FmHA Harnett county office, and Marshall Woodall (hereinafter "Woodall"), the attorney who was designated to close the economic emergency loan, traveled to Duke from Lillington, North Carolina for the purpose of having Mr. Matthews execute the necessary papers to close the

Economic Emergency Loan which FmHA had approved.

21. Mr. Matthews had a surgical procedure performed on him on the morning of December 21, 1978.

22. Patterson and Woodall met with Mr. Matthews on December 21, 1978, in his hospital room.

23. Upon information and belief, Mr. Matthews did at that time sign a promissory note for eight-eight thousand and 00/100 dollars ($88,000.00) and a deed of trust to all of the real property owned by Mr. Matthews and defendant as security for the obligation.

24. At the time of Mr. Matthews' signing of the note and deed off [*sic*] trust, defendant was not present, but was at her home in Lillington.

25. On December 22, 1978, Woodall brought note and deed of trust which had been signed by Mr. Matthews to defendant's home and directed her to CO-sign each document.

26. Woodall had represented Mr. Matthews and defendant in other matters prior to December of 1978.

27. Upon information and belief, at all times relevant to this action, Woodall was acting as agent for FmHA.

28. Woodall made no attempt to explain the aforementioned note and deed of trust to defendant. He told her only that her husband had signed them and that her signature was also required.

29. Defendant, at the time of signing the note and deed of trust, was under a great deal of stress because of

the grave illness of her husband.

30. No agent of the plaintiff at any time made any attempt to explain the nature of the transaction to defendant or the nature of the obligation she was incurring by executing the note and deed of trust.

31. At all times prior to the signing of the note and deed of trust, defendant relied on Mr. Matthews to handle the financial affairs of the household.

32. Mr. Matthews died on April 17, 1979.

33. Upon information and belief, many or all of the obligations refinanced by the aforesaid Economic Emergency Loan were in the form of insured loans to Mr. Matthews.

34. Upon information and belief, had Mr. Matthews and defendant not refinanced the insured debts, they would have been declared satisfied in full upon Mr. Matthews' death.

35. One of the insured obligations was a note in the amount of eleven thousand nine hundred and 00/100 dollars ($11,900.00) to the Federal Land Bank with a securing deed of trust.

36. For some time before Decedent's death, the regular annual payments on the Federal Land Bank loan were made from a credit disability policy which was issued for said loan.

37. Said credit disability policy was canceled at the time the Federal Land Bank loan was refinanced.

FIRST AFFIRMATIVE DEFENSE -
LACK OF MENTAL CAPACITY

38. The allegations contained in paragraphs 1 through 37 above are realleged and incorporated herein by reference.

39. Upon information and belief, Mr. Matthews did not have the requisite mental capacity to contract at the time he signed the promissory note and deed of trust referred to in the complaint.

40. Upon information and belief, at no time between December 21, 1978, and Mr. Matthews' death on April 7, 1979 did Mr. Matthews regain his mental capacity to the extent necessary to ratify or affirm his signing of the note and deed of trust.

41. All of the property listed in the deed of trust attached to the complaint was held by the defendant and Mr. Matthews as tenants by the entireties at the time of the signing of the note and deed of trust.

42. According to Section 39-13.6 of the North Carolina General Statutes, "Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any way encumber any property so held" (held as tenants by the entirety) "without the written joinder of the other spouse".

43. Because of Mr. Matthews' mental incapacity, his signature on both the note and the deed of trust is of no effect.

44. Because Mr. Matthews did not join in the granting of the deed of trust with defendant, said deed of trust in

[*sic*] ineffective to create any interest in plaintiff.

SECOND AFFIRMATIVE DEFENSE - VIOLATION OF FMHA REGULATIONS

45. The allegations contained in paragraphs 1 through 44 above are realleged and incorporated herein by reference.

46. 7 C.F.R. 1807.2(f)(7), states in part: "Persons having a disability of minority or mental incompetency . . . are not to execute the promissory note.

47. Upon information and belief Decedent's Dialysis Dementia rendered him mentally incompetent to execute a note or deed of trust.

48. Under FmHA regulations, and given the obvious nature of Mr. Matthews' illness, plaintiff was under a duty to ascertain whether Mr. Matthews was competent to sign the note and deed of trust.

THIRD AFFIRMATIVE DEFENSE - UNDUE INFLUENCE

49. The allegations contained in paragraphs 1 through 48 above are realleged and incorporated herein by reference.

50. Because of his past representation of Mr. Matthew [*sic*] and defendant, Woodall was in a position of confidence with defendant and defendant believed that he represented her interest in the transaction with FmHA.

51. Defendant trusted Woodall to act in her best interest.

52. Defendant's weakened condition due to stress caused by her husband's illness increased her reliance upon Woodall to act for her and her husband in financial matters.

53. While acting as agent for plaintiff, Woodall took advantage of defendant's reliance on him when he directed her to sign the note and deed of trust to FmHA.

54. Because of Woodall's exercising undue influence over defendant in inducing her to execute the note and deed of trust, Debtor is entitled to recission [*sic*] of the note and deed of trust.

CLAIM FOR RECOUPMENT - BREACH OF FIDUCIARY DUTY

55. The allegations contained in paragraphs 1 through 54 above are realleged and incorporated herein by reference.

56. FmHA is a lender of last resort which lists among its purposes to help marginally subsistent farmers prosper.

57. FmHA seeks to accomplish its purpose both by financing farming operations and by helping its borrowers to become more efficient.

58. In the regular course of its business, Defendant [*sic*] FmHA insinuates itself into the everyday affairs of its borrowers and in fact becomes a co-manager of its borrower's farm operations to try to help its borrowers run a more profitable operation.

59. At all time [*sic*] relevant to this action, Defendant [*sic*] FmHA was

[*sic*] been in a position of confidence with Mr. Matthews and defendant.

60. At all time [*sic*] relevant to this action, FmHA exercised a great deal of influence and control over Mr. Matthews' and defendants' *[sic]* financial affairs through its dealing with Mr. Matthews and defendant.

61. FmHA, at all times relevant to this action, dealt with Mr. Matthews and defendant in a fiduciary capacity and has had a duty to act for the benefit of defendant. This duty included the duty to ascertain the effect of refinancing Mr. Matthews' debts given his grave illness.

62. The note and deed of trust signed by Mr. Matthews and defendant for the benefit of FmHA was not in the best interest of defendant and execution of same constituted a breach of FmHA's fiduciary duty to defendant.

63. The note and deed of trust to FmHA left defendant with a significantly greater debt loan [*sic*] than she would have had had the original debts not been refinanced.

64. Upon information and belief, had Mr. Matthews' original debts not been refinanced, defendant would have been able to satisfy most, if not all, of said debts upon the death of Mr. Matthews through credit life insurance.

65. Because of FmHA's breach of its fiduciary duty to defendant, defendant is entitled to recision [*sic*] of the note and deed of trust, and recoupment of all amounts paid under same.

DEMAND FOR JURY TRIAL

66. Defendant demands a trial by jury of all issues so triable.

WHEREFORE, defendant prays the Court enter judgment as follows:

a. That plaintiff have and recover nothing of defendant;

b. That the note and deed of trust to FmHA signed by defendant and her late husband be rescinded;

c. That defendant recoup all amounts heretofore paid by her under the note to FmHA, plus interest as allowed by law.

d. that the costs of this action be taxed to the plaintiff;

e. That the Court grant such other relief as it may deem just and proper.

This 14th day of March , 1995.

LAND LOSS PREVENTION PROJECT
Attorneys for defendant
By: /s/ Stephen A. Woodson
Stephen A. Woodson
610 E. Church Street
P.O. Box 564
Ahoskie, NC 27910
(919) 332-5124

VERIFICATION

I, PEARL B. MATTHEWS, being duly sworn, depose and say that the contents of the foregoing answer are true to my own knowledge except matters stated on information and belief and those matters I believe to be true.

This the 14th day of March, 1995.

/s/ Pearl B. Matthews

Pearl B. Matthews

Sworn to and subscribed to before me
this 14 day of March, 1995.
/s/Phyllis S. Baker
Notary Public
My Commission Expires:
May 10, 1998